Petition

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NO 81-_____

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

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JAMES TURMAN, ETC., ET AL.,
Petitioner

V.

ALICIA MORALES, ET AL.,
Respondent

• • •

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

• • •

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QUESTION PRESENTED

Whether the district court's award of $384,778.05 as attorneys' fees and costs is an appealable final decision under 28 U.S.C. §1291?

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* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

The Petitioner State of Texas respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 29, 1981.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is *Morales v. Turman*, No. 80-1868 (5th Cir., July 29, 1981). The district court award of attorneys' fees is *Morales v. Turman*, No. CA-1948 (E.D.Tex., June 12, 1980). Both opinions are reproduced as Appendix A hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit in *Morales v. Turman* was entered on July 29, 1981.

This petition for writ of certiorari was filed within ninety days after final judgment in this case. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1291 (1961)

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

42 U.S.C. §1988 (1976)

* * *

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

The original complaint in this civil rights case was filed February 12, 1971, and raised two causes of action: the first concerned Plaintiffs' right to confer and correspond privately with counsel; the second, the then widespread practice of committing juvenile delinquents to confinement by the state without counsel or, sometimes, a hearing. Jurisdiction was based on 42 U.S.C. §1983 and 28 U.S.C. §1331. The first cause of action was finally resolved by the grant of a preliminary injunction, *Morales v. Turman*, 326 F.Supp. 677 (E.D.Tex. 1971), and the Emergency Interim Relief Order, *Morales v. Turman*, 364 F.Supp. 166, 179-89 (E.D.Tex. 1973), with some modification of the law but not the order in the Memorandum Opinion and Order, *Morales v. Turman*, 383 F.Supp. 53, 67 (E.D.Tex. 1974). The second cause of action was resolved by a consent decree in the form of a declaratory judgment entered December 27, 1972, based on agreed findings of fact.

A third cause of action was added in Plaintiffs' Second Amended Complaint raising Eighth Amendment and right to treatment issues. A twenty-six day trial was held in July and August, 1973. After trial and the entry of the Emergency Interim Relief Order of 1973, *supra*, and the Memorandum Opinion Order of 1974, *supra*, appeal was taken as to certain matters, all other questions becoming final in early 1976.

On July 21, 1976, the United States Court of Appeals for the Fifth Circuit reversed the district court below on a procedural issue. *Id.*, 535 F.2d 864 (5th Cir. 1976). That decision was reversed by this Court, *id.*, 430 U.S. 322 (1977), and remanded. After rebriefing, the Fifth Circuit found that the district court abused its discretion in denying Defendants' motion to reopen the record and remanded to the district court with instructions to hear evidence as to changed conditions in the Texas

Youth Council, *id.*, 562 F.2d 993, 996 (5th Cir. 1977) to determine if injunctive relief is still necessary.

On August 1, 1978, Plaintiffs filed their motion for award of costs and attorneys' fees, requesting $207,899.50. After a hearing on the motion held on May 18, 1979, the district court awarded Plaintiffs $384,778.05 of which $207,278.05 was to be paid immediately and $177,500.00 to be paid at "the time of final adjudication of this action," with post-judgment interest on the whole sum from the date of the order, June 12, 1980. (A. 17.) Defendants moved the district court to amend its order, stay the award, and grant permission to take an interlocutory appeal—all of which were denied by the district court on July 26, 1980. (A. 20-21.) Appeal to the Fifth Circuit followed. On July 29, 1981, in an unpublished per curiam order, the Fifth Circuit dismissed the appeal. (A. 1.) On September 1, 1981, the State of Texas paid Plaintiffs the last of the full amount made immediately payable—a total of $207,278.05. This petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Decisions Of This Court And Other Courts Of Appeals.

II. The Appealability Of Attorney's Fees Awards Continues To Perplex Lower Courts And Urgently Needs Resolution By This Court.

III. The Order Awarding Fees Is Final And Appealable As Of Right.

ARGUMENT

I. The Decision Below Conflicts With Decisions Of This Court And Other Courts Of Appeals.

The court below based its summary dismissal of the appeal on *Ruiz v. Estelle*, 609 F.2d 118 (5th Cir. 1980). Its misplaced reliance and extension of the *Ruiz* holding to the facts of this case is in conflict with decisions of numerous courts in the long line of cases based on *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939), decisions whose applicability to §1988 awards was acknowledged by the Fifth Circuit in *Ruiz*.

In both *Greenough* and *Sprague*, the award of attorney's fees as costs after liability had been established but before the litigation was finally concluded was held to be an appealable final order. This Court characterized such fee awards as collateral proceedings of distinct and independent character even though supplemental to the main litigation. 307 U.S. at 169-70; 105 U.S. at 531. Numerous circuit courts of appeals have followed the holdings of *Greenough* and *Sprague*. *See, Swanson v. American Consumer Industries, Inc.*, 517 F.2d 555 (7th Cir. 1975); *Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66 (2d Cir. 1973); *United States Steel Corp. v. United Mine Workers*, 456 F.2d 483 (3d Cir. 1972); *Bakery & Confectionary Workers Int'l Union v. Ratner*, 335 F.2d 691 (D.C. Cir. 1964); *Preston v. United States*, 284 F.2d 514 (9th Cir. 1960); *Angoff v. Goldfine*, 270 F.2d 185 (1st Cir. 1959).

In *Ruiz*, the Fifth Circuit carefully distinguished the *Greenough* line of cases, noting that those awards were made after "the litigation was substantially completed," in contrast to an award made before trial or decision on any of the issues in the main litigation. 609 F.2d at 118, 120. Thus, the *Ruiz* court concluded, the award before them was not final because "all of the parties agree that at least some components of the award are subject to reconsideration on determination of the merits," 609 F.2d at 119.

In the instant case, the award was made after trial, decision and final disposition of every issue. *See, Morales v. Turman,* 326 F.Supp. 677 (E.D.Tex. 1971); *id.,* 364 F.Supp. 166 (E.D.Tex. 1973); *id.,* 383 F.Supp. 53 (E.D.Tex. 1974), *rev'd* 535 F.2d 864 (5th Cir. 1976), *rev'd* 430 U.S. 322 (1977), *rev'd and remanded for further proceedings,* 562 F.2d 993 (5th Cir. 1977). The case is pending before the district court solely for an evidentiary hearing to determine if injunctive relief is still necessary in light of changed conditions at the Texas Youth Council. Thus, the status of this litigation is in marked contrast to that in *Ruiz.*

The court below labored under the incredible misimpression that the district court's deferral of $177,500 of the award indicated at least that portion of the award "may well be reconsidered" (A. 2). Based on this misconception, the court below held that *Ruiz* controlled this case. Nothing in the district court's order lends any credence to the conclusion the award was inconclusive, tentative or incomplete.

Equally telling, counsel for plaintiffs has never suggested the order was inconclusive, tentative, or likely to be "reconsidered". Mere power to change a ruling does not render an order inconclusive when no further consideration is contemplated by the court, *United States v. Gurney,* 558 F.2d 1202, 1207 (5th Cir. 1977), *cert. denied,* 435 U.S. 1968 (1978). The district court's order was conclusive and final with respect to the attorney fee issue because it effectively "ends the litigation...and leaves nothing for the court to do but execute the judgment." *Catlin v. United States,* 324 U.S. 229, 233 (1945); *St. Louis, Iron Mountain & Southern R.R. v. Southern Express Co.,* 108 U.S. 24, 28-9 (1883); *Norwood v. Harrison,* 563 F.2d 722 (5th Cir. 1977).

The inability of the court below to distinguish this award from that in *Ruiz* is symptomatic of the lower

court's larger failure to perceive the obstacle to dismissing the appeal that the *Ruiz* panel carefully attempted to evade: this Court's prior decisions in *Trustees v. Greenough, supra* and *Sprague v. Ticonic Nat'l Bank, supra.* As the *Ruiz* court acknowledged, the holdings in the *Greenough* line of cases are applicable to awards under 42 U.S.C. §1988. Thus, the dismissal of the appeal below solely on the basis of *Ruiz* directly conflicts with those decisions.

Other circuit courts of appeals have disagreed with the Fifth Circuit concerning the applicability of *Greenough* cases to statutory awards, distinguishing the *Greenough* line on the basis of the source of power to award fees by characterizing them as "common fund" cases as opposed to statutory awards. *Boeing Co. v. Van Gemert,* ____U.S.____, n.3, 100 S.Ct. 745, 753 n.3 (1980)(Rehnquist, J., dissenting opinion). This disagreement and the various rationales advanced in support of it is one of the sources of the confusion reigning in the lower courts over the appealability of attorney fee awards, as discussed below.

II. The Appealability Of Attorney's Fee Awards Continues to Perplex Lower Courts And Urgently Needs Resolution By This Court.

With the multiplication of sources of authority to award attorney's fees to prevailing parties, numerous courts have wrestled with the related problem of when awards under statutes such as 42 U.S.C. §1988 and 42 U.S.C. §2000a-3(b) are final and appealable under 28 U.S.C. §1291.

The question is particularly acute and troublesome in complex civil rights litigation. Complex cases, even after liability is established, require the fashioning and implementation of remedial relief "that must prove its

efficacy only over a period of time and often with frequent modifications." *Bradley v. School Board of Richmond*, 416 U.S. 696, 722-23 (1974); *Johnson v. Combs*, 472 F.2d 84, 87 (5th Cir. 1972). As a result, many final orders may issue in the course of the litigation, each of which determines substantial rights of the parties. In recognition of the practical necessity of affording plaintiffs an award of fees in protracted litigation, both Congress and this Court have indicated that an order that finally determines substantial rights is an appropriate occasion to consider a fee award, without awaiting the filing of the last possible order in the case. *Hanrahan v. Hampton*, 446 U.S. 754 (1980); *Bradley v. School Board*, 416 U.S. at 722-23; *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); Senate Report No. 94-1011, 94th Cong., 2nd Sess. (June 29, 1976).

The difficulty these cases present is that they cannot be easily shoehorned into the pattern of ordinary litigation which ends in a unified and final judgment that can be reviewed in one appellate proceeding. The requirement of finality in 28 U.S.C. §1291 has long been interpreted in a practical rather than formal way in recognition of cases that do not follow the typical course of events. *Gillespie v. United States Steel Corp.*, 397 U.S. 148, 152 (1964); *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962).

The instant case exemplifies the problem. The case is ten years old. The award the State seeks to appeal is based on issues that have been thoroughly tried and appealed and are now final. The issue still before the district court concerns only what remedial relief is still necessary. The State has been ordered immediately to pay and has paid over $200,000, and post-judgment interest is accruing on an additional $177,500. This complex class action litigation may be prolonged indefinitely if there is another trial, another final order and subsequent appeal. The appealability of this award is a ques-

tion concerning which the lower courts would disagree. Both results and rationales in prior cases are inconsistent; the circuits cannot agree whether the common fund cases control, how general collateral order doctrine is to be applied, or whether these awards are to be treated as costs or part of the main litigation.

In common fund cases, the appeals are strictly separated. Thus, notice of appeal from an award of fees does not preserve the right to appeal the main case. And failure to file notice of appeal from a fee award will forfeit the right to appeal that award. *Boeing v. Van Gemert*, ____U.S.____, 100 S.Ct. 745 (1980); *Swanson v. American Consumer Indus., Inc.*, 517 F.2d 555, 559 (7th Cir. 1975).

This consensus concerning common fund cases collapses when lower courts confront statutory awards. Not one circuit is firmly committed for or against the bifurcated appeals rules of the common fund cases.

The strict separation of the appeals in common fund cases was first enforced in *Swanson v. American Consumer Indus., Inc.*, 517 F.2d 555 (7th Cir. 1975). In *Hidell v. Int'l Diversified Investments*, 520 F.2d 529 (7th Cir. 1975), the same circuit applied its *Swanson* decision in a non-common fund case. 520 F.2d at 532 n.4. In *Terket v. Lund*, 623 F.2d 29 (7th Cir. 1980), the Seventh Circuit seemed to adopt a common fund approach to a §1988 case, requiring a separate notice of appeal from the fee award after a judgment on the merits, citing *Hidell* and *Swanson*. The court observed,

> Regardless of whether an award under §1988 is collateral enough to permit an interlocutory appeal, it seems clear that it involves an exercise of the district court's judgment requiring an examination of factors beyond the issues decided with the merits of the suit and also different

> from the largely ministerial task of taxing the traditional items of costs.

623 F.2d at 33.

The Third Circuit, in an employment discrimination case, took an opposite tack, holding that an order that resolved every issue on the merits except for attorney's fees was not final and not appealable. *Richerson v. Jones,* 551 F.2d 918 (3rd Cir. 1977). In *Lowe v. Pate Stevedoring Co.,* 595 F.2d 256 (5th Cir. 1979), an appeal was allowed from an award of attorney's fees in an unfair representation case despite the pendency in the district court of plaintiff's prayer for reinstatement. *Swanson* and *Preston v. United States,* 284 F.2d 514, 515 n.1 (9th Cir. 1960)(common benefit case) were cited in support. *Hidell* and *Lowe* cannot be reconciled with *Richerson.*

The Second Circuit in *Aetna Casualty & Surety Co. v. Giesow,* 412 F.2d 468 (2d Cir. 1969) and *Union Tank Car Co. v. Isbrandtsen,* 416 F.2d 96 (2d Cir. 1969) held that where the award of attorney's fees is "dependent on a contract under construction by the court in the litigation, ...the contract may more usefully be completely construed on one trial and appeal, and the matter be considered a unitary claim in considering appealability." *Union Tank Car,* 416 F.2d at 97. In *Cinerama, Inc. v. Sweet Music, S.A.,* 482 F.2d 66 (2d Cir. 1973), Judge Friendly distinguished *Giesow* and *Union Tank Car* as contract cases in contrast to awards subject to judicial discretion. In the latter instance, "the question whether counsel fees should be awarded to a successful party, and if so how much, may well be, at least in some instances, sufficiently distinct to warrant characterization as a separate claim, so that its deferral will not deprive the basic judgment of finality." 482 F.2d at 70 n.2. This distinction describes awards such as this one under §1988 quite as well as those in common fund cases.

In *Ruiz v. Estelle*, 609 F.2d 118 (5th Cir. 1980), the applicability of common fund cases such as *Greenough*, *Swanson* and *Angoff v. Goldfine*, 270 F.2d 185 (1st Cir. 1959), was acknowledged, but the opposite result was reached than in *Lowe v. Pate Stevedoring*, 595 F.2d 256 (5th Cir. 1979). In *Ruiz*, the Fifth Circuit also added a requirement of a showing of irreparable harm, and distinguished the common fund cases on the basis that in those decisions the litigation was substantially complete. The Fifth Circuit compounded its confusion by citing *Alart Associates, Inc. v. Aptaker*, 402 F.2d 779 (2d Cir. 1968) as "similar." *Alart* involved a disciplinary award of $300 against a defendant under Rule 56(g), F.R.C.P., for frivolous and dilatory actions.

The confusion and misdirection experienced in reviewing these inconsistent decisions is redoubled when considering two recent decisions: *Bradford Exchange v. Trein's Exchange*, 644 F.2d 682 (7th Cir. 1981), and the summary dismissal of the appeal in this case. In *Bradford Exchange*, the Seventh Circuit appears to be backpedaling from *Swanson*, *Hidell* and *Terket*. Factually, the case is similar to *Ruiz;* the award was made before trial or decision on any substantive issue. The court held, contrary to *Ruiz*, that the common fund cases did not apply and the award could not be appealed. The court suggested *Swanson* and *Hidell* should be limited to their facts and cited with approval *Richerson v. Jones* and *Union Tank Car*. As did the Fifth Circuit in *Ruiz*, the Seventh Circuit distinguished *Swanson Hidell* and *Terket* because "all involved awards of attorneys' fees made contemporaneously with, or after, a judgment on the merits in the main case." 644 F.2d at 683 (7th Cir. 1981).

In summary, the Seventh Circuit distinguishes common fund awards from statutory awards and compares the latter to awards based on contracts. The Third Circuit does not allow an appeal until the last order in the

case. The Second Circuit distinguishes contractual awards from statutory and common fund awards. The Fifth Circuit first allows, then forbids appeals from statutory awards, compares statutory awards with both common fund and disciplinary awards, and, finally, in the instant case abandons the distinction between awards after a judgment on the merits or "substantial completion of the litigation," and awards made early in the suit—a distinction meanwhile adopted by the Seventh Circuit.

> Perhaps all these cases can be reconciled in some principled manner; if not, it is only a matter of time before this Court will have to try its hand at an issue that obviously has been perplexing other federal courts.

Boeing Co. v. Van Gemert, ____U.S.____, 100 S.Ct. 745, 753 n.3 (1980)(Rehnquist, J., dissenting opinion).

III. The Order Awarding Fees Is Final And Appealable As of Right.

Although the attorney's fee order sought to be appealed does not dispose of the entire litigation, it is nonetheless appealable as of right under 28 U.S.C. §1291 as a final collateral order independent of the underlying litigation. The common fund cases since *Trustees v. Greenough*, 105 U.S. 527 (1882) are applicable and controlling over this §1988 award. Under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Co.*, 337 U.S. 541 (1949), this order is appealable. Finally, both the policies underlying the final order rule and the allowance of interlocutory attorney's fee awards are better served by permitting an immediate appeal from such awards.

The common fund cases are not meaningfully different from the award in this case. A decision under §1988 is

indisputably "a collateral one, having a distinct and independent character." *Greenough*, 105 U.S. at 431. The district court must, as in this case, hear evidence and make findings on questions such as counsel's skill and expertise that are not germane to the main litigation. *See, Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). Frequently, the question of fees cannot be settled until a final decision and appeal of the merits in statutory cases as well as common fund cases. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 169 (1939). 42 U.S.C. §1988 does not authorize even an interim award until a party has finally prevailed on a substantive claim. *Hanrahan v. Hampton*, 446 U.S. 754 (1980).

The Third Circuit's simplistic approach in *Richerson v. Jones*, 551 F.2d 918 (3rd Cir. 1977), a Title VII case, ignores the problem of interim awards in complex class action civil rights cases where many "final" orders on the merits may issue. *E.g., Bradley v. School Board of Richmond*, 416 U.S. 696, 722-23 (1974). The myopic assumption in *Richerson* that civil rights cases are garden variety litigation that end in a single unified final judgment blinks reality. The decisions on the substantive issues upon which this award is predicated are final and will not be relitigated. As this Court has observed, the requirement that only prevailing parties may be awarded fees itself encompasses a notion of finality analogous to finality under 28 U.S.C. §1291. *Bradley*, 416 U.S. at 722, n.28. There is no reason to divorce common fund awards from statutory awards which in every practical sense are identical.

As the generalized collateral order doctrine of *Cohen v. Beneficial Indus. Loan Co.*, 337 U.S. 541 (1949) is a consanguinous development from *Trustees v. Greenough*, 105 U.S. 527 (1882), analysis under its formula should favor the same result. The Fifth Circuit's summary dismissal of the appeal below in reliance on an

earlier case applying *Cohen* to a §1988 fee award, *Ruiz v. Estelle*, 609 F.2d 118 (5th Cir. 1980), is legally and factually erroneous.

This Court has recently reformulated the *Cohen* doctrine:

> The order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). *See also, Firestone Tire & Rubber Co. v. Risjord*, ____U.S.____, 101 S.Ct. 669, 674 (1981).

The order in question here conclusively determined the issue of fees. The clearest signal of finality has always been the ability to execute and secure payment. *Catlin v. United States*, 324 U.S. 229, 233 (1945); *St. Louis I.M. & S.R.R. v. Southern Express Co.*, 108 U.S. 24, 28-9 (1883). The Fifth Circuit's position below is that this order is not conclusive, but that Texas must pay anyway. This result is unconscionable; how in justice can an "inconclusive" order require Texas to pay over $200,000?

That a fee award under §1988 is collateral is now too well established to require argument. The sticking point for the court below seems to be the requirement that the order be unreviewable on appeal from a final judgement. This has not always been required under *Cohen*. *See, North American Acceptance Corp. Securities Cases v. Arnall, Golden and Gregory*, 593 F.2d 642, 645 n.5 (5th Cir. 1979).

This order is effectively unreviewable if appeal is postponed to an indefinite future. First, the formula-

tion in *Coopers & Lybrand*, 437 U.S. 463, 468 (1978), was directed at the "death knell" doctrine of class certification questions, and not the difficulties of interim attorney's fees. The difficulty is that in cases such as this one there is no readily identifiable final judgment that unites the fee issue with the merits. As this Court's analysis in *Coopers* establishes at length, class certification questions are enmeshed with the merits and become part of a unified final judgment. 437 U.S. at 469. In civil rights class action litigation many final orders may result. Neither *Coopers* nor the Fifth Circuit below can identify the characteristics of an order on the merits "final" for purposes of reviewing an earlier fee award. Is it the next appealable order on the merits or must Texas wait for the "last" order in this already ten year old lawsuit?

Second, the payment of money, regardless whether the result of an "interim" award, renders the order effectively final. This Court has ruled in many contexts that an award of costs before final judgment is an appealable final order. *Greenough* is one example, *Cohen* another. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the cost of notice to the class was held to be an appealable final order. *See also, In re Franklin Nat'l Bank Securities Litigation*, 574 F.2d 662, 663 n.1 (2nd Cir. 1978); *In re Nissan Motor Corp.*, 552 F.2d 1088, 1094-96 (5th Cir. 1977). As commentators have noted:

> [I]t seems clear that once the costs dispute has been resolved by the district court, appellate review is desirable, and cannot reasonably be left to depend upon the hazards of opportunity to appeal from some other final decision.

15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3916, at 610 (1976).

Third, not only is the timing of this award unreviewable on appeal from some other decision, but also Texas has no protection from risk of loss of all or a substantial part of the $200,000 already paid if the award is eventually reversed. The Youth Law Center has no financial assets and its income is dependent upon grants from the Legal Services Corp. (whose continued existence is now in doubt) and other charitable donations. A bank that would make an unsecured loan of $200,000 to a non-profit organization such as the Youth Law Center would be considered financially irresponsible, and the Fifth Circuit's statement that the "state has not shown that ... a refund will not be available" is equally irresponsible with funds of the taxpayers of Texas.

The policies underlying the final judgment rule are not disserved by allowing appeals from interim awards such as this one. First, in most class action civil rights cases more than one appeal is inevitable as the fractured history of this case illustrates. Second, appeal from a fee award will not delay or interfere with prosecution of the main litigation because the issue is easily separable from the merits, again as this case demonstrates. A flood of appeals is unlikely as interim awards in large-scale litigation are not usual. The history of allowing appeals in common fund cases indicates such fears are groundless.

Third, uncertainty of the propriety of the fee award is unsettling to both parties in the future prosecution of the main action. Removal of the threat of reversal will remove any inhibitions about using the funds, furthering the very purpose of the interim award. In addition, this court has already reviewed one interim award under §1988 in *Hanrahan v. Hampton*, 446 U.S. 754 (1980); this practice should not now be reversed. And continuation of the present state of confusion wastes judicial resources as protective appeals must be filed from the

merits and from fee orders, given the current uncertainty as to the proper relation between the merits and fee awards for purposes of appeal. This same uncertainty will almost surely result in the injustice and in improper award of fees that have been visited upon Texas in the decisions of the courts below in this case.

CONCLUSION

For these reasons, Petitioners pray that the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit issue.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-1868
Summary Calendar

ALICIA MORALES, ET AL., *Plaintiffs-Appellees,*

V.

JAMES TURMAN, Individually and in his official capacity as Executive Director, Etc., ET AL., *Defendants-Appellants.*

Appeal from the United States District Court for the Eastern District of Texas

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(JULY 29, 1981)

Before CHARLES CLARK, REAVLEY and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

The state of Texas asks this court to reverse an interim award of attorney's fees granted by the district court. In Ruiz v. Estelle, 609 F.2d 118, 119 (5th Cir. 1980), however, this court held that an interim award of attorney's fees was not an appealable order. Thus, the plaintiffs argue that the appeal should be dismissed for lack of jurisdiction.

The state attempts to distinguish *Ruiz* in two ways. First, the state argues that, unlike the fee award in *Ruiz*,

the award in this case is not subject to reconsideration prior to final judgment. We note, however, that only $208,000 of the $385,000 awarded to the plaintiffs is to be paid at the present time; the remaining $177,000 is to be paid upon final judgment and may well be reconsidered in the meantime. The state also argues that the award in this case is much larger than the award in *Ruiz*, and that the state will suffer irreparable damage if it must pay the plaintiff now and defer review until final judgment. The *Ruiz* opinion does not indicate the amount of the interim award in that case. In any event, while the payment of almost $208,000 will impose a financial burden on the state, the burden does not rise to the level of irreparable damage. As in *Ruiz*, the legitimacy of the award will be fully reviewable upon final judgment. The state has not shown that, should the award ultimately prove to be improper, a refund will not be available. Thus, there is no meaningful distinction between this case and *Ruiz*, and the appeal must be

DISMISSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

ALICIA MORALES, ET AL.)

V.) CIVIL ACTION NO.

JAMES A. TURMAN, ET AL.) 1948

MEMORANDUM OPINION AND ORDER

The procedural history of this long and arduous civil

action has been adequately chronicled elsewhere.[1] Nor is this litigation yet complete; it has been remanded to this court "for further evidentiary hearings." *Morales v. Turman*, 562 F.2d 993, 997 (5th Cir. 1977). With new hearings impending, plaintiffs have filed a motion for an award of attorney's fees and costs. Although defendants vigorously protest an award, all of their objections are without merit. The motion will be granted.

I.

ENTITLEMENT TO AWARD OF ATTORNEY'S FEES

In 1976, Congress enacted the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, (hereinafter "Section 1988" or "the Act"). In relevant part, the Act provides:

> In any action or proceeding to enforce a provision of [42 U.S.C. §§1981-1986] . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Attorney's fees awards have repeatedly been made pursuant to the Act, even when the only pending question at the time of the passage of the Act was one of attorney's fees. *E.g., Corpus v. Estelle*, 605 F.2d 175 (5th Cir. 1979) (note numerous cases cited); *Rainey v. Jackson State College*, 551 F.2d 672 (5th Cir. 1977). The Eleventh Amendment does not bar awards against state defendants under the Act, including awards in cases pending at the time the Act was passed. *E.g., Hutto v. Finney*, 437 U.S. 678 (1978); *Corpus v. Estelle, supra.* The Act authorizes awards in cases pending on the date of enactment for services rendered before that date. *Corpus v. Estelle, supra.* Indeed, the Act not only

permits an award of attorney's fees, but under the circumstances of this case, an award is compelled. A successful party in a civil rights action "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggy Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); Senate Report No. 94-1011, 94th Cong., 2nd Sess. 4, *reprinted in* (1976) U.S. Code Cong. & Ad. News 5908, 5912 (hereinafter "Senate Report", page citations to U.S. Code Cong. & Ad. News). *Accord, e.g., International Oceanic Enterprises, Inc. v. Menton*, 614 F.2d 502 (5th Cir. 1980); *Johnson v. Mississippi*, 606 F.2d 635 (5th Cir. 1979); *Iranian Students Association vs. Edwards*, 604 F.2d 352 (5th Cir. 1979); *Concerned Democrats of Florida v. Reno*, 601 F.2d 891 (5th Cir. 1979). Defendants' lengthy recitation of putative special circumstances notwithstanding, the facts of this action present no circumstances that would render an award of attorney's fees unjust. *See, e.g., Dennis v. Chang*, 611 F.2d 1302 (9th Cir. 1980); *International Oceanic Enterprises, Inc. v. Menton, supra; Johnson v. Mississippi, supra.*[2] Substantial authority supports plaintiffs' entitlement to an award of attorney's fees;[3] however, defendants assert additional arguments to preclude or limit plaintiffs' recovery of such compensation.

First, defendants claim that the mandate of the Fifth Circuit Court of Appeals, in remanding this case, constituted a limited remand permitting this court to hear only additional evidence related to defendants' motion to reopen the record. Accordingly, defendants urge, this court has no jurisdiction to entertain an application for attorney's fees. Defendants misapprehend the concept of a limited remand. A limited remand occurs when the Court of Appeals retains jurisdiction and remands the action to the district court with specific directions, usually to clarify the district court's order. *See U.S. v. Theriault*, 526 F.2d 698, (5th Cir. 1976), *cert. denied*, 429 U.S. 898 (1976). Here, the Court of Appeals remanded

the action for further proceedings. It did not retain jurisdiction. The silence of the mandate on the issue of attorney's fees leaves this court free to exercise jurisdiction over a motion for an award for attorney's fees. *Quern v. Jordan*, __U.S.__, 99 S.Ct. 1139 (1979); *Sprague v. Ticnoic National Bank*, 307 U.S. 161 (1939); *Hirschkop v. Snead*, 475 F.Supp. 59 (E.D. Va. 1979). *See also, e.g., Foley v. Smith*, 437 F.2d 115 (5th Cir. 1971).

Second, defendants urge that plaintiffs' motion for attorney's fees is untimely. "Because Congress directed that attorney's fees under section 1988 be treated as costs, there is no jurisdictional time limit on filing of a motion seeking such fees. Thus, the district court could, in its discretion, entertain the motion for attorney's fees." *Knighton v. Watkins*, 616 F.2d 795, 798 (5th Cir. 1980) (footnote omitted). All the circumstances of this case militate in favor of an exercise of discretion to entertain plaintiffs' motion for an award of attorney's fees. *See also Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624, 635 (6th Cir. 1979) ("[P]laintiffs' delay in applying for fees . . . is hardly grounds for denying fees.")

Third, defendants argue that plaintiffs are not entitled to an award of attorney's fees for work expended upon those causes of action from which defendant did not appeal, since those issues were not pending.' Again, defendants misunderstand the law. "The legislative history expressly states that the statute is intended to apply to all 'pending' cases, and 'pending' means that all the issues in the case have not been finally resolved. So long as there was an active controversy in the case at the time the Act became effective, the Act applies to authorized fees for the entire case . . . ." *Northcross v. Board of Education of Memphis City Schools, supra*, 611 F.2d at 633-34. *See also Escamilla v. Santos*, 591 F.2d 1086 (5th Cir. 1979). The issues in this litigation that

have not been finally resolved are too numerous to enumerate; it is beyond peradventure that there remains an active controversy.

Fourth, defendants maintain that plaintiffs are not the prevailing parties in this action. "Even where the victory is only the vindication of the correctness of plaintiff's position and, therefore, may be characterized as moral vindication, counsel's fees may be awarded." *Knighton v. Watkins,* 616 F.2d 795, 799 (5th Cir. 1980). *Accord, Rainey v. Jackson State College, supra,* 551 F.2d at 676-77. To be entitled to an award of attorney's fees, a party must establish entitlement to some relief on the merits. *Hanrahan v. Hampton,* __U.S.__, 48 U.S.L.W. 3780 (1980). In this case, plaintiffs have obtained more than a moral vindication of their position. They have obtained relief on the merits with regard to those elements of the final injuction that defendants did not appeal, *i.e.,* those dealing with physical abuse, use of tear gas, use of solitary confinement, the silence requirement, and the matter of repetitive tasks. They have obtained the releif specified in the preliminary injunction, reported at 326 F. Supp. 677, concerning access to counsel. Also, defendants claim in their supplemental brief in the Court of Appeals that substantial changes have occurred in the Texas Youth Council, since the initial trial of this case, that improve the lot of plaintiffs. These alleged changes are outlined by the Fifth Circuit Court of Appeals at 562 F.2d 996-97. Given the character of defendants' defense during the initial trial of this action and the timing of the purported changes, it is unquestionable that these changes, if they have occurred, were a direct result of this action and of plaintiffs' vigorous, able and successful prosecution of it. If the changes have occurred as defendants described them to the Court of Appeals, they have improved the repressive, cruel conditions to which the plaintiff class has been subjected. It is ludicrous to argue, as defendants do, that plaintiffs did

not want such relief from their punishments. It would be no less absurd to find that plaintiffs obtaining such substantial relief are not prevailing parties.

Finally, defendants urge that an award of attorney's fees *pendente lite* should not be made in this action. "It is evident that Congress contemplated the award of fees *pendente lite* in some cases." *Hanrahan v. Hampton, supra,* 48 U.S.L.W. at 3781. "In appropriate circumstances, counsel fees under [section 1988] may be awarded *pendente lite. See Bradley v. School Board of City of Richmond,* 416 U.S. 696 (1974). Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues. [Citations omitted.] Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgement or without formally obtaining relief." Senate Report, *supra* at 5912 (footnote omitted). *Accord, Iranian Students Association v. Edwards, supra; Panior v. Iberville Parish School Board,* 543 F.2d 1117 (5th Cir. 1976); *Howard v. Phelps,* 443 F. Supp. 374 (E.D. La. 1978). As outlined above, plaintiffs have prevailed on the merits on multiple important matters in the course of this litigation. Furthermore, these impecunious plaintiffs are about to embark on another round of hearings in this action. These circumstances militate in favor of awarding attorney's fees *pendente lite.* Only the amount of the award remains to be determined.

II.

AMOUNT OF THE AWARD OF ATTORNEY'S FEES

Pursuant to Section 1988, plaintiffs are entitle to recover a reasonable attorney's fee. In *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir.

1974), the Fifth Circuit Court of Appeals developed twelve guidelines which the district court must consider in determining what constitutes a reasonable fee. "Although *Johnson* involved a suit brought under 42 U.S.C.A. § 2000e *et. seq.*, the guidelines we established there are equally useful whenever the award of reasonable attorneys' fees is authorized by statute." *Matter of First Colonial Corp. of America*, 544 F.2d 1291, 1299 (5th Cir. 1977), *cert. denied sub nom. Baddock v. American Benefit Life Insurance Co.*, 431 U.S. 904 (1977). *Accord, Bunn v. The Central Realty of Louisiana*, 592 F.2d 891 (5th Cir. 1979); *Fain v. Caddo Parish Police Jury*, 564 F.2d 707 (5th Cir. 1977); *Rainey v. Jackson State College, supra.* These twelve factors will be considered *seriatim.*

1. *The Time and Labor Required.* In support of their fee request, plaintiffs have submitted affidavits of counsel and counsel has testified concerning the number of hours expended on legal services in this action.[5] From the court's intimate acquaintance with this litigation, its close scrutiny of the affidavits, and the unquestionable veracity of plaintiffs' counsel, it is apparent the time claimed is reasonable and represents an efficient use of counsel's time. The time claimed was necessary for a successful and adequate presentation of the difficult issues in this action and was actually spent. There does not appear to be any duplication of services for the time claimed; any duplications that may have occurred are more than offset by the evident understatement of the time claimed by plaintiffs. "If anything, the hourly estimates appear unrealistically low." *Cruz v. Beto*, 453 F. Supp. 905, 909 (S.D. Tex.), *aff'd*, 603 F.2d 1178 (5th Cir. 1979).

Defendants argue that plaintiffs should not recover fees for any work spent on issues on which the plaintiffs have not prevailed. Defendants specifically urge that given the reservations of the Court of Appeals, 562 F.2d

997-99, and the Chief Justice, *O'Connor v. Donaldson*, 422 U.S. 563, 578 (1975) (Burger, C.J., concurring), concerning the right to treatment issue, plaintiffs should not recover for any time spent working on that issue.

Although the argument that the amount the prevailing party recovers (for attorney's fees) should be proportional to the extent that the party prevails has support in case law, the law in the area is not settled. Compare, *e.g., Northcross v. Board of Education of Memphis City Schools, supra; Fain v. Caddo Parish Polic Jury, supra* (dicta); and *Donaldson v. O'Connor*, 454 F. Supp. 311 (N.D. Fla 1978) with, *e.g., Jones v. Diamond*, 594 F.2d 997 (5th Cir. 1979) (dicta); *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978); *Hughes v. Repko*, 578 F.2d 483 (3rd Cir. 1978). On remand in *Donaldson v. O'Connor, supra*, 454 F. Supp. at 315-7, the court noted the conflicting case law concerning the extent to which attorney's fees must be proportional to the degree of plaintiffs' success. After thoroughly and persuasively reviewing the legislative history, the court concluded that plaintiffs are entitled to an award for all time reasonable expended on a matter, even for time spent on issues on which the plaintiff did not prevail. Thus, the plaintiff in *Donaldson* ultimately received an attorney's fee award for time counsel spent working on the right to treatment issue.

In *Northcross v. Board of Education of Memphis City Schools, supra*, 611 F.2d at 236, the court stated:

> The question as to whether the plaintiffs have prevailed is a preliminary determination, necessary before the statute comes into play at all. Once the issue is determined in the plaintiffs' favor, they are entitled to recover attorneys' fees for "all time reasonably spent on a matter." The fact that some of the time was spent pursuing issues on research which was

> ultimately unproductive, rejected by the court, or mooted by intervening events is wholly irrevelant. So long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith.

The legislative history supports this view of the law. The Senate Report states:

> In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter."

Senate Report, *supra*, at 5913. The Senate Report further declares that *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), *rev'd on other grounds*, 436 U.S. 597 (1978), and *Davis v. County of Los Angeles*, 8 E.P.D. §9,444 (C.D. Cal. 1974), correctly applied the appropriate standards. In both of these cases, the court awarded fees for time spent on issues on which the plaintiffs did not prevail.

In light of the legislative history of Section 1988, both *Northcross* and *Donaldson* are correct in awarding fees for all time reasonably expended on the prosecution of the action, whether or not plaintiff ultimately prevailed on all issues. In this action, given the state of the law at the time, it was not only reasonable for plaintiffs to prepare and argue the right to treatment issue, it would have a dereliction not to. *See Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *vacated and remanded*, 422 U.S. 563 (1975). It is equally true in this action, as in *Donaldson*, that "it cannot be denied that work expended on these issues constituted a reasonable expenditure of time at the beginning of this complex and unprecedented case, and plaintiff should receive a reasonable at-

torney's fee for these efforts." *Donaldson v. O'Connor, supra,* 454 F. Supp. at 317 (footnote omitted).

2. *The Novelty And Difficulty Of The Questions.* This is an exrtaordinarily complex and difficult case. As the first statewide attack on a juvenile justice system, it presented multiple unusual and knotty issues, both in complexity and scope, including, *inter alia,* the rights of juveniles to due process, access to counsel and courts, the right to treatment, cruel and unusual punishment, and three-judge court jurisdiction. Counsel addressed the difficulties of the case with novel solutions, *e.g.,* participant observer discovery and proposals for comprehensive equitable remedies.

3. *The Skill Requisite To Perform The Legal Service properly.* Counsel addressed this action with dedication, determination and considerable abililty. They overcame various hurdles through their innovative ideas. They displayed ample skill to perform the necessary legal services.

4. *The Preclusion of Other Employment By The Attorneys Due To Acceptance Of The Case.* Because of the massive amounts of time necessary to an adequate prosecution of this case, plaintiffs' counsel were necessarily precluded from working on other matters.

5. *The Customary Fee.* Since plaintiffs' counsel were all employed by the Youth Law Center, an organization providing free legal representation for juveniles and whose employees are all salaried, plaintiffs' counsel have no customary fees. Defendant suggest that the salary levels of plaintiffs' counsel is the proper rate for reimbursement. Prevailing parties represented by organizations or attorneys who do not charge fees may still recover attorney's fees and in the same amount as awarded to private attorneys. *E.g., Dennis v., Chang, supra; Torres v. Sachs,* 538 F.2d 10 (2d Cir. 1976);

Thompson v. Madison County Board of Education, 596 F.2d 682 (5th Cir. 1974); *Fairley v. Patterson*, 493 F.2d 598 (5th Cir. 1974); *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970).

Larry Watts, Esquire, an attorney who has appeared before this court numerous times in civil rights cases, submitted an affidavit concerning his customary fees. From 1971 to 1976, his customary fees were never lower than $50.00 per hour for himself, $35.00 per hour for associates and $10.00 per hour for law clerks. Since 1976, his customary fee has been $100.00 per hour, $60.00 per hour for associates and $20.00 per hour for law clerks.

6. *Whether The Fee Is Fixed Or Contingent.* The individual plaintiffs in this action have no obligation to pay any attorney's fee. Any fees recovered by counsel were contingent upon prevailing on the merits and on a motion for court awarded fees. Due to the developing state of the law and the complexity of the factual issues at the outset of this litigation, it was far from certain that plaintiffs would prevail. Accordingly, the attorney's fees recovered by plaintiffs in this case should be enhanced by a factor of two. *See e.g., Knighton v. Watkins, supra; Northcross v. Board of Education of Memphis City Schools, supra; Wolf v. Frank*, 555 F.2d 1213 (5th Cir. 1977); *Miller v. Mackey International, Inc.*, 515 F.2d 241 (5th Cir. 1975); *Stanford Daily v. Zurcher, supra.* The fees for obtaining this award will not be so enhanced. *See, Bagby v. Beal*, 606 F.2d 411 (3d Cir. 1979) neither will be fees for the services of law students. *See In re Equity Funding Corp.*, 438 F. Supp. 1303 (C.D. Ca. 1977), *aff'd*, 603 F.2d 1353 (9th Cir. 1979).

7. *Time Limitations Imposed By The Client Or The Circumstances.* Adequate presentation of this action required repeated quick response to particular circumstances and tight time deadlines, including seeking

and obtaining temporary injunctive relief at the outset of the litigation so that plaintiffs might communicate with counsel. 326 F. Supp. 677.

8. *The Amount Involved And The Results Obtained.* The substantial results obtained by plaintiffs has been discussed above. Since this action sought only injunctive relief, there was no amount involved in the strict sense. However, Congress "intended that the amount of fees awarded under [Section 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature." Senate Report, *supra*, at 5913. *Accord, Knighton v. Watkins, supra.*

9. *The Experience, Reputation, And Ability Of The Attorneys.* Plaintiffs were fortunate to have obtained such capable, qualified, experienced, and dedicated counsel. Plaintiffs' counsel and the Youth Law Center are leaders in the field of juvenile justice and juvenile law. They repeatedly displayed their expertise throughout the pendency of this action, and their unlimited exercise of their capabilities was of great benefit to the court, as well as to their clients, in the determination of the case. Though some of the attorneys representing plaintiffs are young, they displayed skill that belies their ages. Attorneys of such outstanding reputation and ability must be compensated at a rate commensurate with their qualifications.

10. *The Undesirability Of The Case.* As Tracy Crawford, Esquire, defendants' expert witness, testified, this was an unpopular cause and brought considerable public sentiment against the plaintiffs' attorneys. As a member of the community where this action was tried, the court can corroborate Mr. Crawford's testimony. It can not be seriously contended that the representation of "juvenile delinquents", without pay,

in a civil rights action commencing in East Texas in 1971, was a desirable case. The simple fact that plaintiffs' counsel could not expect a fee, alone, made the case undesirable. *Guajardo v. Estelle,* 432 F. Supp. 1373 (S.D. Tex. 1977), *aff'd,* 580 F.2d 748 (5th Cir. 1978).

11. *The Nature And Length Of The Professional Relationship With The Client.* Aside from this action, plaintiffs' counsel have no ongoing attorney client relationship with these plaintiffs. There is no reason why this factor should cause the fee to be increased or diminished.

12. *Awards In Similar Cases.* Since the amount of time necessarily and actually spent must be taken into account in determining a reasonable attorney's fee, awards in similar cases are helpful mostly to identify a reasonable hourly rate. Recent cases have approved the following fees: *Northcross v. Board of Education of Memphis City Schools, supra* (experienced counsel: $125.00 per hour for trial work, $75.00 per hour for other services; less experienced counsel: $40.00 per hour and $60.00 per hour for all services); *Harkless v. Sweeney Independent School District, 608 F.2d 594 (5th Cir. 1979), aff'd,* 466 F. Supp. 457 (S.D. Tex. 1978) ($75.00 per hour for all services; total award: $256,500); *Corpus v. Estelle, supra* ($90.00 per hour for trial and appellate work, $75.00 per hour for other services awarded to Mr. Turner; total award $38,845.00); *Brown v. Culpepper,* 559 F.2d 274, *reh. den.,*561 F.2d 1177 (5th Cir. 1977) ($75.00 per hour and $65.00 per hour for all services); *Wolf v. Frank, supra* (experienced counsel: $150.00 per hour for trial work, $100.00 per hour for other services; less experienced counsel: $100.00 per hour for trial work, $75.00 per hour for other services);*Pugh v. Rainwater,* 465 F. Supp. 41 (S.D. Fla. 1979) ($90.00 per hour for all services; total award: $55,372.50); *Cruz v. Beto, supra* ($90.00 per hour for trial work, $75.00 per hour for other services, $35.00 per hour for informal communica-

tions awarded to Mr. Turner; $70.00 and $50.00 per hour for trial work, $60.00 and $40.00 per hour for other services, $35.00 per hour for informal communications awarded to other counsel; total award: $24,870.00); *Guajardo v. Estelle, supra* (total award: $127,565.00).

Conclusion. The credible testimony at the fee hearing, the detailed affidavits preparead by counsel, and this court's own observations support the time claimed by plaintiffs in their application for attorney's fees. *See* Note 5, *supra.* The award will be based on those hours. This court's experience, the affidavit of Mr. Watts concerning customary fees, and the awards in similar cases support the hourly rates claimed by plaintiffs: $90.00 per hour for trial work by experienced attorneys, $75.00 per hour for all other services performed by experienced attorneys, $60.00 per hour for trial work by less experienced attorneys, $50.00 per hour for all other services performed by less experienced attorneys, $10.00 per hour for travel time and $10.00 per hour for law students.[7] As indicated above, taking into account the contingent nature of the case, the award for work on merits will be enhanced by a factor or two. On this basis, the awards will be calculated as follows: $168,800 for work by attorneys at the Youth Law Center on the merits (this amount to be multiplied by two); $17,400 for work by law students on the merits, for a total award of $355,000 to the Youth Law Center for work on the merits; $4,810.00 to the Youth Law Center for work on the application for attorney's fees; and $8,677.50 to Mr. Turner for work on the application for attorney's fees. The award will be made against the State of Texas. *See, e.g., Hutto v. Finney, supra; McNamara v. Moody,* 606 F.2d 621 (5th Cir. 1979); *Rainey v. Jackson State College, supra; Morrow v. Dillard,* 580 F.2d 1284 (5th Cir. 1978); Senate Report, *supra,* at 5913.

Since the award is an award *pendente lite*, it would ordinarily be conditioned on plaintiff's posting a

bond. *See Ruiz v. Estelle*, 609 F.2d 118 (5th Cir. 1980). However, since plaintiffs have proposed that one-half the award be made payable immediately and the other half upon final adjudication of the action, this procedure will be followed in lieu of requiring plaintiffs to post a bond.[8]

III.

EXPENSES

The reasonable expenses of plaintiffs in pursuing this litigation are payable by defendants. *See, e.g., Northcross v. Board of Education of Memphis City Schools, supra; Jones v. Diamond, supra; Wheeler v. Durham City Board of Education*, 585 F.2d 618 (4th Cir. 1978); *Fairly v. Patterson, supra; Payne v. Travenol Laboratories, Inc.*, 74 F.R.D. 19 (N.D. Miss. 1976); 28 U.S.C. § 1920. Plaintiffs claim a total of $17,102.00 expenses for the merits by the Youth Law Center, $916.00 for the fee application by the Youth Law Center and $182.55 by Mr. Turner on the fee application.[9] With one exception, the expenses on the merits are reasonable and necessary. Undoubtedly, they are substantially understated. The exception is the $1,910.00 in payment to law students. The record indicates that the payment labeled as "per diem" by plaintiffs was more in the nature of a daily salary. Since plaintiffs are being compensated for the time of the law students, it is inappropriate to award this amount paid to the law students as well. The expenses listed during the time of work on the application for attorney's fees are all reasonable, necessary, and actually incurred. With the one exception, all expenses will be awarded and will be payable forthwith.

The total amount of the award is large. Nonetheless, it is necessary to adequately compensate plaintiffs' counsel for their skillful, resolute, compassionate and

successful representation of these otherwise defenseless members of society. The relief that plaintiffs' counsel obtained benefits not only the children incarcerated in the Texas Youth Council, but inures to all members of society. It is of benefit to everyone to have cruel treatment of children eliminated and to provide an improved environment in which those children can grow to be better citizens of the future. Only by an award of this magnitude can plaintiffs' counsel be compensated for this Herculean work. Accordingly, as an exercise of this court's discretion, it is

ORDERED that the State of Texas pay to the Youth Law Center the sum of $182,310.00, as attorney's fees, and the sum of $16,108.00, as expenses, immediately, and $177,500.00, as attorney's fees, at the time of final adjudication of this action. Post-judgment interest shall accrue on the total award from the date of this order. It is further

ORDERED that the State of Texas pay to William Bennett Turner, Esquire, the sum of $8,677.50, as attorney's fees, and $182.55, as expenses, payable immediately.

SIGNED and ENTERED this 11th day of June, 1980.

/s/

CHIEF JUDGE

FOOTNOTES

1. *See Morales v. Turman*, 383 F. Supp. 53 (E.D.Tex. 1974), *rev'd and remanded*, 535 F.2d 864 (5th Cir. 1976), *rev'd and remanded*, 430 U.S. 322 (1977), *on remand*, 562 F.2d 993 (5th Cir. 1977); 364 F. Supp. 166 (E.D.Tex. 1973); 59 F.R.D. 157 (E.D. Tex. 1972); 326 F. Supp. 677 (E.D. Tex. 1971).

2. To the extent that defendants rely on *Henderson v. Ft. Worth Independent School District*, 574 F.2d 1210, *vacated en banc*, 584 F.2d 115 (5th Cir. 1978), *cert. denied* __U.S.__, 99 S.Ct. 1996 (1979), in support of their claim that special circumstances would make an award of attorney's fees in this case unjust, that reliance is misplaced. "The *Henderson* panel decision was declared of no precedental value by the *en banc* court." *Johnson v. Mississippi, supra*, 606 F.2d at 637 (5th Cir. 1979). *Accord, Criterion Club of Albany v. Board of Commissioners*, 594 F.2d 118 (5th Cir. 1979).

Defendants' analogous claim that Section 1988 should not be applied to this action because to do so would result in manifest injustice is similarly devoid of merit. *Corpus v. Estelle*, 605 F.2d 175 (5th Cir. 1979).

3. Given the clarity of plaintiffs' entitlement to an award of attorney's fees pursuant to Section 1988, it is unnecessary to address the alternative grounds plaintiffs urge as support for their application for attorney's fees.

4. If there has been a final adjudication, a civil action is not pending for the purposes of the Act. *Escomilla v. Santos*, 591 F.2d 1086 (5th Cir. 1979). However, even where a court of appeals has entered its opinion, if a motion for rehearing has been filed, the appeal, and thus the case, is pending until the court of appeals decides the motion for rehearing and the mandate issues. *Sethy v. Almeda City Water District*, 602 F.2d 894 (9th Cir. 1979).

5. The record supports a conclusion that counsel for plaintiffs spent the following amounts of time on the activities indicated:

Attorney	Court Appearances (trial & appeal)	All Other services	Travel
Merits:			
Sandmann	209 hours	1058.5 hours	
Bercu	200 hours	441.5 hours	
Hoffman	3 hours	31.0 hours	
Martinez	2 hours	40.0 hours	
Polk	6 hours	86.0 hours	
Dixon		64.0 hours	
Walker		6.0 hours	
Tessler		16.0 hours	
Rosenzweig		16.0 hours	
All Attorneys			280 hours
Law Students	175 hours	1565.0 hours	

Fee Application:		
Turner	3 hours	110.5 hours
Brorby		2.4 hours
Sandmann	3 hours	42.0 hours
Tessler		24.0 hours
Sandmann & Tessler		14 hours

Although Mr. Sandmann was at the hearing on plaintiffs' application for attorney's fee, he did not specifically claim the time. However, since he was present in court and his attendance was necessary, Mr. Sandmann's time at the hearing will be compensated.

As this action began years before the date of enactment of the Act, counsel did not keep contemporaneous time records for their work on the merits. The affidavits concerning the work done on the merits in this action constitute a reconstruction of the time spent after a meticulous examination of the record by counsel. (Plaintiffs' counsel have kept accurate contemporaneous time records for time spent on the application for attorney's fees.) Given the care with which plaintiffs' counsel prepared their affidavits and the credibility of their testimony, defendants' complaint that the time claimed by plaintiffs is insufficiently substantiated has been recently precluded by *Harkless v. Sweeney Independent School District*, 608 F.2d 594, 597 (5th Cir. 1979).

> While it is by far the better practice for attorneys to keep time sheets, such documentaton is not always essential. Here the representation was not rendered by a law firm primarily engaged in providing services to paying clients, but by a group of lawyers motivated by their conception of the public interest, who make it a practice not to accept compensation from their clients. . . . As the Court of Appeals for the First Circuit suggests, the ends of justice would not be well served by demanding detailed documentation of the expenditure of time made prior to the passage of the statute. *Souza v. Southworth*, 564 F.2d 609 (1st Cir. 1977).

The use of law students to perform certain services such as interviewing inmates of the Texas Youth Council represents a reasonable and efficient use of resources. The work done by law students left plaintiffs' counsel free to spend their time on other matters which required the attention of an attorney. Plaintiffs may recover for the services of these law students, but at a lower rate than for the services of an attorney. *See, e.g., In Re Armored Car Antitrust Litigation*, 472 F. Supp. 1357, 1387 (N.D. Ga. 1979) ($20 per hour); *In Re Equity Funding Corp.*, 438 F. Supp. 1303, 1330 (C.D. Ca. 1977), *aff'd*, 603 F.2d 1353 (9th Cir. 1979). In addition, although counsel are entitled to be compensated for their travel time, it also must be at a lower rate. *E.g., Cruz v. Beto*, 453 F. Supp. 905 (S.D. Tex. 1977), *aff'd*, 603 F.2d 1178 (5th Cir. 1979) ($10.00 per hour); *Ruiz v. Estelle*, No. 5523 (E.D. Tex. July 27, 1977), *appeal dismissed*, 609

F.2d 118 (5th Cir. 1980)($10 per hour). Finally, plaintiffs are entitled to an award of attorney's fees for time spent on appeal and establishing the fee claim. *E.g., Kingsville Indepen-dent School District v. Cooper,* 611 F.2d 1109 (5th Cir. 1980); *Johnson v. Mississippi, supra; Gates v. Collier,* 559 F.2d 241 (5th Cir. 1979); *Rainey v. Jackson State College, supra.*

6. When considering awards in similar cases, the admonition in the legislative history that awards under the Act are "governed by the same standards which prevail in other types of equally complex federal litigation, such as antitrust cases", must be remembered. Senate Report, *supra* at 5913; *Knighton v. Watkins, supra.*

7. For the purposes of determining the hourly rate, and from this court's familiarity with counsel's work product, experience, ability and reputation, Sandmann, Bercu, Polk and Turner are entitled to compensation at the rate for experienced attorneys and Hoffman, Martinez, Dixon, Walker, Tesler, Rosenzweig and Brorby are entitled to compensation at the rate for less experienced attorneys.

8. The withholding of one-half of the award will apply only to fees for work on the merits. The entire award for work on the application for attorney's fees will be payable immediately.

9. EXPENSES:

Merits:

Travel:	
Air fare	$8,800.00
Per diem (meals & lodging)	4,650.00
Photocopying	742.00
Telephone	1,000.00
Law student per diem	1,910.00
	$17,102.00

Fee Application:

Travel (Sandmann & Tessler):	
Air fare	596.00
Per diem (meals & Lodging)	320.00
	916.00
Turner	182.55

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

ALICIA MORALES, et al., Plaintiffs,	Civil Action No. 1948
v.	ORDER DENYING MOTION FOR AMENDMENT OF ORDER OF JUNE 12, 1980, DENYING PERMISSION TO TAKE INTERLOCUTORY APPEAL AND DENYING STAY
JAMES A. TURMAN, et al., Defendants	

Upon due consideration of defendants' motion for amendment of the Court's Order filed June 12, 1980, defendants' application for permission to take an interlocutory appeal and defendants' motion for a stay, and plaintiffs' response thereto, it is hereby ORDERED as follows:

1. Defendents' motion for an amendment of the Court's Order filed June 12, 1980, is denied, since plaintiffs have indicated their willingness to stipulate to refund fees received that are ultimately determined to have been erroneously awarded.

2. Defendants' application for permission to take an interlocutory appeal is denied. The Court finds that an interlocutory appeal would not materially advance the termination of the litigation; the Court finds that, to the contrary, an interlocutory appeal would delay termination of this already protracted litigation.

3. Defendants' motion for a stay is denied. Defendants have not specified any grounds whatever for a stay of the Court's Order.

Signed and entered this 26th day of July, 1980.

/s/Wm. Wayne Justice

United States District Judge

Opposition

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No. 81-797

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES TURMAN, et al.,

Petitioners,

v.

ALICIA MORALES, et al.,

Respondents.

On Petition for Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the award of interim counsel fees and costs, in the circumstances of this case, is appealable as of right under 28 U.S.C. §1291.

LIST OF ALL PARTIES IN DISTRICT COURT

Petitioners:

James Turman, Executive Director, Texas Youth Council
Thomas Riddle, Superintendent, Gainesville State School for Girls
Ronald Jackson, Superintendent, Brownwood State Home and School for Girls
M. B. Kindrick, Superintendent, Gatesville State School for Boys
Pete Harrell, Superintendent, Crockett State School for Girls
George B. Adams, Superintendent, Mountain View State School for Boys
Robert W. Kneebone, Member, Texas Youth Council
Louis M. Henna, Member, Texas Youth Council
W. Forrest Smith, Member, Texas Youth Council
Roland Daniel Green, Assistant Attorney General, State of Texas
Edwin Berliner, Judge of 171st Judicial District
Les Tribble, County Judge, Grayson County
Lewis Russell, Juvenile Court Judge, Dallas County
Ted Robertson, Juvenile Court Judge, Dallas County

Respondents:

Alicia Morales
Judith Ann Arnold
Beverly James
D'Lanie Jorgenson
Lynn Bourland
Lynn McDaniel
Marie Hargreaves
Dirk Fitzgerald
Michael Fernandez
James Schott
Marvin Brown
Phillip Ward
Billy Ray Rogers
David Grant Ladd
Douglas William Branch
Virgil Dale Harmon
Darrell Arthur Hicks
Brenda Faye Malbro
Mable Lois Davis
Deborah Melcher Luke
Mary Katherine Johnson
Brenda Kay Hughes
Donna Kay Donovan

Amici:

United States of America
American Orthopsychiatric Association
American Psychological Association
American Association on Mental Deficiency

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No. 81-797

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES TURMAN, et al.,

Petitioners,

v.

ALICIA MORALES, et al.,

Respondents.

On Petition for Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

This is a class action on behalf of all juvenile offenders incarcerated in Texas Youth Council ("TYC") institutions. The issues on the merits include the procedures by which the offenders become TYC wards and the conditions of their confinement.

The present petition involves an attempt by petitioners (defendants in the district court) to prosecute an interlocutory appeal from an order granting counsel fees and costs pendente lite.

The action was filed in 1971, and the six-week trial was held in 1973. Respondents (plaintiffs in the district court) obtained substantial relief that was not appealed. Thus, a preliminary injunction safeguarded their right to counsel and access to the courts. Morales v. Turman, 326 F.Supp. 677 (E.D. Tex. 1971). The district court's Emergency Interim Relief Order, issued immediately following the trial, protected TYC wards from many of the most serious abuses revealed at trial. Morales v. Turman,

364 F.Supp. 166 (E.D. Tex. 1973). An agreed upon declaratory judgment, reforming the juvenile justice system in over 250 Texas jurisdictions, was incorporated in the court's comprehensive memorandum decision. Morales v. Turman, 383 F.Supp. 53, 68 (E.D. Tex. 1974).

Petitioners' appeal on the merits was before the Fifth Circuit twice. The court first held that a three-judge court was required to grant the relief ordered by the district court. Morales v. Turman, 535 F.2d 864 (5th Cir. 1976). This Court summarily reversed. Morales v. Turman, 430 U.S. 322 (1977). The Fifth Circuit then remanded the case to the district court to take further evidence on the merits. Morales v. Turman, 562 F.2d 993 (5th Cir. 1977). Responding to petitioners' contention that circumstances had significantly changed since the trial, so that final injunctive relief should be denied or limited, the court held:

> "[T]his case must be remanded for a further evidentiary hearing concerning changes that have occurred in TYC . . . . An additional hearing is necessary to complete the record with TYC being afforded a full opportunity to present proof of such changes." 562 F.2d at 996.

Contrary to petitioners' repeated assertion that the underlying issues "are now final" (Petition at 8; see Id. at 3, 6, 13), proceedings to resolve the merits are very much alive in the district court. On October 15, 1979, following an unsuccessful motion in the district court to require petitioners to specify those matters about which they would offer further evidence, respondents served 121 interrogatories seeking to learn petitioners' contentions as to alleged changes in policies and conditions since trial. Virtually all of petitioners' answers, filed in November and December, 1979, asserted that significant reforms had occurred since trial, that abuses had been eliminated, facilities improved and rehabilitative programs added.

Defendants stated that they wished to offer "documentary evidence and testimony" on "programs and operations" even beyond those inquired about, including TYC's case management system, its monitoring and auditing system, its alleged college program, and so on; further, "Defendants anticipate gathering and offering evidence on additional topics." Defendants' Answer to Interrogatory 117, served December 21, 1979.

Respondents then sought discovery as to the basis for each of petitioners' substantive contentions. They propounded 558 interrogatories and requests for production of documents; petitioners responded with nine volumes of materials received only a month ago. Within the past several months, respondents' counsel have also conducted inspection tours of the TYC facilities, accompanied by expert witnesses. On August 21, 1981, the parties filed a Joint Status Report with the district court, advising the court that the parties "have recently initiated an attempt to negotiate a settlement of all outstanding issues to the lawsuit." Joint Status Report (E.D. Tex. filed August 21, 1981). However, the Report specifically preserves "any objection a party may have to the inclusion or exclusion of any issue which may be the subject of negotiation." Id.

In short, the suit is far from over, with petitioners insisting below on their right, at the evidentiary hearing ordered by the Fifth Circuit, to present evidence on virtually every substantive issue in the case. It is true, as noted above, that respondents have obtained very significant relief on the merits of their claims, but several other important claims are still in dispute and there has been no "final" adjudication of them.

It was in the context of the Fifth Circuit's remand that the district court granted respondents' motion for

interim counsel fees and costs. A formal evidentiary hearing on the motion was held, and the court awarded the National Center for Youth Law $182,310 as fees and $16,108 as expenses, payable immediately, and $177,500 as fees payable "at the time of final adjudication of this action." Petition, A-17. The court also awarded $8,677.50 as fees and $182.55 as expenses of respondents' counsel for the fee litigation.

Petitioners sought certification for an interlocutory appeal pursuant to 28 U.S.C. §1292(b), but this was denied by the district court. The court explicitly found that "an interlocutory appeal would not materially advance the termination of the litigation," and that, "to the contrary, an interlocutory appeal would delay termination of this already protracted litigation." Petition, A-21 (Order of July 29, 1980).

Petitioners nonetheless filed an interlocutory appeal of the interim counsel fee award, asserting an appeal as of right under 28 U.S.C. §1291. On December 5, 1980, the Fifth Circuit denied their motion for a stay pending appeal. Petitioners then made partial payment of the fees and costs. On July 29, 1981, the Fifth Circuit dismissed the appeal. Petition, A-1. On September 1, 1981, petitioners paid the remaining balance due, so that any further amounts under the district court's order are not payable until "the time of final adjudication of this action." Petition, A-17.

REASONS WHY THE WRIT SHOULD BE DENIED

The writ should be denied because (1) the appeal is so insubstantial as not to justify exercise of the Court's certiorari jurisdiction, (2) the decision below is not in conflict with any applicable decision of this Court or of another court of appeals, and (3) the underlying issue that petitioners seek to appeal is without merit.

1. The Appeal is so Insubstantial as Not to Justify Exercise of the Court's Certiorari Jurisdiction

A party may not appeal under 28 U.S.C. §1291 until there has been a decision by the district court that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Firestone Tire & Rubber Co. v. Risjord, 101 S.Ct. 669, 673 (1981), quoting from Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978), and Catlin v. United States, 324 U.S. 229, 233 (1945); see Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (district court's "final judgment," conclusively determining defendant's liability, held non-appealable).

There is a "narrow exception" to the non-appealability rule: a "small class" of decisions are reviewable before final judgment, but they "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." Firestone Tire & Rubber Co. v. Risjord, supra, 101 S.Ct. at 673, 674; Coopers & Lybrand v. Livesay, supra, 437 U.S. at 468-69. In considering whether Section 1291 permits a particular interlocutory appeal, the Court has given the statute a "practical" construction. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949); accord Firestone Tire & Rubber Co. v. Risjord, supra, 101 S.Ct. at 674.

In this case the practical reality is that very little is at stake on petitioners' appeal. Petitioners have already paid the entire amount due, and no further payment is due until the "final adjudication" of the action. Petition, A-17. Moreover, in response to a request by petitioners' counsel, respondents agreed to repay the interim award, with interest, if upon appeal from a final judgment any part of the award is determined to have been erroneous. (Annexed as Appendix A to this Brief is the request from petitioners'

counsel; attached as Appendix B is the stipulation executed on behalf of respondents; see also Petition, A-21 (court's acknowledgment of respondents' willingness to stipulate to refund fees).) This agreement to repay the fees -- in the unlikely event that it is ultimately decided that respondents were not entitled to them -- means that the order petitioners seek to appeal does not "conclusively determine the disputed question" and is not "effectively unreviewable on appeal from a final judgment." Firestone Tire & Rubber Co. v. Risjord, supra; Coopers & Lybrand v. Livesay, supra.

Thus, petitioners' appeal presents an insubstantial matter that does not call for exercise of this Court's certiorari jurisdiction.1/ There are no "special and important reasons" requiring this Court's review at this stage of the proceedings. Supreme Court Rule 17.1. Moreover, even if the Court granted certiorari and reversed, directing the Fifth Circuit to hear petitioners' appeal, there is every likelihood that, before any appeal could be decided, the case will be either settled or resolved by final judgment. In that event, the interlocutory appeal will have been completely unnecessary, as all matters will be reviewable on appeal from the final judgment.

2. The Decision Below is Not in Conflict with any Applicable Decision of this Court or of Another Court of Appeals

Petitioners argue that the decision below, holding the interim fee award non-appealable in the circumstances of

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1/ The unimportance of the issue presented is indicated by the Fifth Circuit's treatment of it. The court dismissed the appeal in an unpublished per curiam order on the summary calendar. Appeals are placed on the summary calendar when they are determined to be frivolous, governed by existing precedent or not worthy of oral argument. Fifth Circuit Rule 18.2; Fed.R.App.P.34(a). Appeals disposed of in unpublished opinions deal with "no substantial matter." Fifth Circuit Policy Manual, policy 16.11.01.

this case, is in conflict with the Court's decisions in Sprague v. Ticonic Nat. Bank, 307 U.S. 161 (1939), and Trustees v. Greenough, 105 U.S. 527 (1882). There is no such conflict.

In Sprague, there was no contention that the fee order was not appealable, and the Court's opinion thus does not even mention any appealability issue. All issues in the litigation in the district court had been resolved when that court refused to grant counsel fees from bond proceeds created by the litigation. This Court held that the court was not in fact powerless to grant such fees from a common fund. See Boeing Co. v. Van Gemert, 100 S.Ct. 745, 753, n. 2 (1980) (Rehnquist, J., dissenting).

Nor did Greenough involve an interim fee award. The award itself was "final," even though some continuing administration of the trust fund was contemplated. 105 U.S. at 531. Greenough was a "peculiar" case. Id. It was treated by Sprague as involving fees "as between solicitor and client." 307 U.S. at 169. Both Greenough and Sprague were common fund cases in which the orders resolved fee liability as between the plaintiffs who prosecuted the action and the non-appearing beneficiaries of the common fund created by the plaintiff's action. See Boeing Co. v. Van Gemert, supra, 100 S.Ct. at 749, 752. The orders were final determinations "as between solicitor and client," though perhaps not "between party and party." Cf. Sprague, supra, at 165. Neither Sprague nor Greenough involved an interim fee or a fee recovery directly from an opposing party.

Though petitioners cite several court of appeals decisions, they do not assert that any is in direct conflict with the decision below. None of their cases held that an interim fee award against a defendant was appealable as of right under Section 1291. Indeed, the cases most resembling

the present one held that fee awards against defendants, prior to final judgment on the merits, were not appealable. Bradford Exchange v. Trein's Exchange, 644 F.2d 682 (7th Cir. 1981); Richerson v. Jones, 551 F.2d 918, 921-23 (3d Cir. 1977) (no appealable order until last of prayers for relief is ruled on).2/ Accordingly, no conflict of authority requires the exercise of the Court's certiorari jurisdiction. Supreme Court Rule 17.1(a) and (c).

3. The Underlying Issue that Petitioners Seek to Appeal is Without Merit

Respondents have obtained more than "some relief on the merits." Hanrahan v. Hampton, 100 S.Ct. 1987, 1989 (1980). They have obtained very substantial relief on the merits of several important issues. See pp. 1-2, supra. An award of interim fees was plainly appropriate. Hanrahan v. Hampton, supra; Bradley v. School Board, 416 U.S. 696, 723 (1974); Sen. Rep. No. 94-1011, 94th Cong., 2d Sess., p. 5 (June 29, 1976) (fee awards pendente lite appropriate under 42 U.S.C. §1988); House Rep. No. 94-1558, 94th Cong., 2d Sess., p. 8 (Sept. 15, 1976) (Id.). That final relief on other issues remains unresolved does not undermine the propriety of an interim fee award. Indeed, the purpose of such awards, as recognized by the Senate and House reports cited

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2/ The other cases cited by petitioners are not in point. Terket v. Lund, 623 F.2d 29 (7th Cir. 1980), held that the appeal from a counsel fee award was not properly before the court, since an award "after judgment is entered on the merits" requires a notice of appeal and none was filed. 623 F.2d at 33. Lowe v. Pate Stevedoring Co., 595 F.2d 256 (5th Cir. 1976), permitted an attorney's appeal from denial of a lien on funds awarded to his client, a matter "as between solicitor and client." In Hidell v. Int'l Diversified Investments, 520 F.2d 529, 532, n. 4 (7th Cir. 1975), full relief on the merits had been granted, with the amount of fees the only open matter. Swanson v. American Consumer Industries, Inc., 517 F.2d 555, 560 (7th Cir. 1975), was a common fund case, with fees granted after final determination of the merits. As noted by the court in Bradford Exchange, supra, all these cases involved awards "contemporaneously with, or after, a judgment on the merits" and allocated costs as "between solicitor and client." 644 F.2d at 682.

supra, is served by the award here. The purpose is to make it possible for counsel in civil rights cases, in which substantial relief has been granted, to obtain interim fees and costs and thus be able to carry protracted litigation through to final judgment. The House Report emphatically states that "the word 'prevailing' is not intended to require the entry of a final order before fees may be recovered." House Report No. 94-1558, supra, at 8 (emphasis in original). Allowing interlocutory appeals would frustrate the Congressional purpose of authorizing fee awards pendente lite. The practical reality is that, if interim awards are immediately appealable, they are rendered useless. Defendants like petitioners here would prefer to appeal now and pay later, and are sure to prosecute every interim appeal available to them.

Nor is this a case for carving out an exception to the rule against piecemeal appeals. Petitioners' principal argument on the merits of their appeal is that "If construed retroactively to allow this award, the Act [§1988] is unconstitutional because it is not appropriate legislation under Congress' Section 5 enforcement powers." Brief for Appellants in Fifth Circuit, pp. 5-6. Yet at least sixteen Fifth Circuit decisions have applied §1988 to uphold fee awards for services prior to its enactment.3/ Decisions in other

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3/ See Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981) (en banc); Robinson v. Kimbrough, 620 F.2d 468 (5th Cir. 1980); Harkless v. Sweeny Independent School District, 608 F.2d 594 (5th Cir. 1979); McNamara v. Moody, 606 F.2d 621, 626 (5th Cir. 1979); Corpus v. Estelle, 605 F.2d 175 (5th Cir. 1979), cert. denied 445 U.S. 919 (1980); Cruz v. Beto, 603 F.2d 1178 (5th Cir. 1979); Dillon v. AFBIC Development Corp., 597 F.2d 556, 564 (5th Cir. 1979); Crowe v. Lucas, 595 F.2d 985, 993-94 (5th Cir. 1979); Rainey v. Jackson State College, 591 F.2d 1002 (5th Cir. 1979); Universal Amusement Co. v. Vance, 587 F.2d 159, 172 (5th Cir. 1978) (en banc); Morrow v. Dillard, 580 F.2d 1284 (5th Cir. 1978); Guajardo v. Estelle, 580 F.2d 748 (5th Cir. 1978); Gore v. Turner, 563 F.2d 159, 163-64 (5th Cir. 1977); Miller v. Carson, 563 F.2d 741, 754-56 (5th Cir. 1977); Gates v. Collier, 559 F.2d 241 (Footnote 3 continued on next page.)

circuits unanimously have come to the same result.[4/] Three decisions of this Court have upheld fee awards for pre-§1988 services.[5/] No case has limited recovery to services performed after the Act.

Further, petitioners' argument, tried unsuccessfully in several of the cases cited in note 3 supra, disregards settled principles for measuring the Section 5 powers of Congress. See Corpus v. Estelle, 605 F.2d 175 (5th Cir. 1979), cert. denied 445 U.S. 919 (1980); cf. Fullilove v. Klutznick, 100 S.Ct. 2758, 2774-75 (1980) (Section 5 broad grant of Congressional authority to deal with civil rights matters); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Section 5 authority for private Title VII suits against states and state officials); Katzenbach v. Morgan, 384 U.S. 641, 651, 653 (1966); Ex Parte Virginia, 100 U.S. 339, 345-46 (1880).

To say, as petitioners do, that Section 1988 is not "appropriate legislation" ignores the teachings of Hutto v. Finney, 437 U.S. 678 (1978). There, the Court approvingly noted the district court's reasoning -- that a substantial fee award "may incline the department to act in such a manner that further protracted litigation about the prisons will not

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3/(cont.) (5th Cir. 1977); Hodge v. Seiler, 558 F.2d 284, 286 (5th Cir. 1977).

4/ See, e.g., Fox v. Parker, 626 F.2d 351, 353-54 (4th Cir. 1980); Williams v. Alioto, 625 F.2d 845, 849 (9th Cir. 1980); Holley v. Lavine, 605 F.2d 638, 645-46 (2d Cir. 1979); Wisenberger v. Huecker, 593 F.2d 49 (6th Cir. 1979); Mid-Hudson Legal Services, Inc. v. G & U, Inc., 578 F.2d 34 (2d Cir. 1978); Perez v. Rodriques Bou, 575 F.2d 21 (1st Cir. 1978); Wharton v. Knefel, 562 F.2d 550, 557 (8th Cir. 1977); Bond v. Stanton, 555 F.2d 172 (7th Cir. 1977), cert. denied 438 U.S. 916 (1978).

5/ Maher v. Gagne, 100 S.Ct. 2570 (1980); Supreme Court of Virginia v. Consumers Union, 100 S.Ct. 1967, 1972, n. 7 (1980); Hutto v. Finney, 437 U.S. 678, 695, n. 3 (1978).

be necessary." 437 U.S. at 691. Also, counsel fees in equity cases like the present one are not "retroactive" in the sense of damages or restitution. "Instead, the award reimburses [the plaintiff] for a portion of the expenses he incurred in seeking prospective relief." Id. at 695, n. 24 (emphasis added).6/ In other words, a fee award in a case like this one serves both to provide a disincentive to further litigation and to reimburse respondents' counsel for part of the very substantial costs of obtaining injunctive and declaratory relief, relief effective at present and prospectively. See Corpus v. Estelle, supra, 605 F.2d at 176, n. 4.

In short, petitioners' principal argument on appeal is without merit. Their other arguments relate not to the power to make an award but to the computation of the amounts awarded, a matter entrusted to the district court's discretion. 42 U.S.C. §1988; Knighton v. Watkins, 616 F.2d 795, 800 (5th Cir. 1980), and cases cited; Johnson v. Georgia Highway Express, 488 F.2d 714, 716-17 (5th Cir. 1974). The Court should not exercise its certiorari jurisdiction to sanction a basically meritless interlocutory appeal.

6/ The State of Texas, represented by the same Attorney General's office as here, filed an amicus brief in Hutto making the same argument as on petitioners' appeal in this case. See Brief of State of Texas as amicus curiae in No. 76-1660, at 6-7. The argument was of course rejected.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Dated: November 27, 1981

Respectfully submitted,

William Bennett Turner
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Donna Brorby
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July 15, 1980

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RECEIVED
JUL 18 1980

Mr. William Bennett Turner
354 Pine Street
San Francisco, California 94104

Re: Morales v. Turman,
Attorneys Fees

Dear Bill:

I have received your proposed Stipulation concerning the attorney fee award in the Morales case. As you know, we believe there are several problems with the court's order which no doubt will need to be addressed on appeal. We are currently assessing the feasibility of pursuing an interlocutory appeal; that decision may be influenced by your willingness to include in the Stipulation and Order a provision that you and the Youth Law Center will repay any wrongfully paid monies with interest at the same rate assessed against defendants. This provision will, of course, more evenly distribute the losses incurred by the State or agency's not having use of the funds if they are ultimitaly determined to be wrongfully paid.

Please let me know whether you and your client will be willing to include this additional stipulation so that I may present all the relevant facts to our clients.

Sincerely,

RICHEL RIVERS
Assistant Attorney General

RR:bh

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

ALICIA MORALES, et al., Plaintiffs, v. JAMES A. TURMAN, et al., Defendants.	Civil Action No. 1948 STIPULATION AND ORDER CONCERNING PAYMENT OF ATTORNEY'S FEES AWARD

IT IS STIPULATED by the parties, through their undersigned counsel, concerning the Order of this Court of June 12, 1980, awarding attorney's fees pendente lite, as follows:

1. Defendants shall pay to the National Center for Youth Law, on or before September 1, 1980, the sum of $198,418, representing $182,310 in fees and $16,108 in expenses awarded in the Order of June 12, 1980, plus interest at the rate of 9% per year from June 12, 1980, until the date paid.

2. Defendants shall pay to William Bennett Turner the sum of $8,860.05, on or before September 1, 1980, representing $8,677.50 in fees and $182.55 in expenses awarded in the Order of June 12, 1980, plus interest at the rate of 9% per year from June 12, 1980, until the date paid.

3. Payments by defendants under paragraphs 1 and 2 are made without prejudice to their opportunity to appeal the issue of the propriety of any fee award on direct appeal of the merits of this action.

4. The National Center for Youth Law (the "Center") agrees to obligate Center resources to refund to the State of Texas General Revenue Fund 1 all or any portion of the

APPENDIX B

interim fees paid by defendants pursuant to paragraph 1 which are ultimately determined by this or any federal appellate court to have been wrongfully paid, plus interest at the rate of 9% per year from the date paid by defendants.

5. Special Counsel for plaintiffs, William Bennett Turner, agrees personally to obligate himself to refund to the State of Texas General Revenue Fund 1 all or any portion of the interim fees, paid by defendants pursuant to paragraph 2 which are ultimately determined by this or any federal appellate court to have been wrongfully paid, to the extent that fees are received by him and not reimbursed by him to the Center, plus interest at the rate of 9% per year from the date paid by defendants.

6. Special Counsel for plaintiffs and the Center agree that should any funds paid by defendants be ultimately determined to have been wrongfully paid, Special Counsel for plaintiffs and the Center will make prompt refund to defendants, through the State of Texas General Revenue Fund 1, upon demand by defendants. If for any reason prompt repayment is not made, this stipulation may be reduced to judgment and defendants may execute said judgment in any appropriate forum, including this Court and the courts of the State of Texas.

Signed and entered this day of July, 1980.

Approved as to form and content:

William Bennett Turner
354 Pine Street
San Francisco, CA 94104
(415) 391-8100
Special Counsel for Plaintiffs

Pauline H. Tesler

Pauline H. Tesler, for the
National Center for Youth Law
693 Mission Street, 6th Floor
San Francisco, CA 94105
(415) 543-3307

Attorneys for Plaintiffs

Richel Rivers
2927 Kassarine Pass
Austin, TX 78704

Attorney for Defendants

SO ORDERED:

U.S. District Judge

No. 81-797

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES TURMAN, et al.,

Petitioners,

v.

ALICIA MORALES, et al.,

Respondents.

On Petition for Certiorari to the
United States Court of Appeals for the Fifth Circuit

DECLARATION OF TIMELY FILING BY MAIL

WILLIAM BENNETT TURNER declares as follows:

1. I am a member of the Bar of this Court. I am an attorney for respondents in this case. I make this declaration pursuant to Rule 28.2 of the Rules of this Court, concerning timely filing by mail of the Brief in Opposition to Petition for Certiorari.

2. On November 27, 1981, I deposited the original and ten copies of the Brief in Opposition to Petition for Certiorari, and the original and one copy of the Motion for Leave to Proceed In Forma Pauperis in a mailbox maintained by the United States Postal Service, Express Mail postage prepaid, addressed to

Alexander L. Stevas, Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington D.C. 20543

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 27, 1981, at San Francisco, California.

William Bennett Turner

No. 81-797

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

RECEIVED
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SUPREME COURT, U.S.

JAMES TURMAN, et al.,

Petitioners,

v.

ALICIA MORALES, et al.,

Respondents.

On Petition for Certiorari to the
United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondents hereby move, pursuant to Rule 46 of the Rules of this Court, for leave to file their Brief in Opposition to Petition for Certiorari without prepayment of costs and to proceed in forma pauperis. The declaration of Peter B. Sandmann, in support of this motion, is attached.

Dated: November 27, 1981

William Bennett Turner
Peter B. Sandmann
Donna Brorby
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(415) 391-8100

Peter Bull
National Center for Youth Law
1663 Mission Street, 5th Floor
San Francisco, CA 94103

Attorneys for Respondents

No. 81-797

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES TURMAN, et al.,

Petitioners,

v.

ALICIA MORALES, et al.,

Respondents.

On Petition for Certiorari to the
United States Court of Appeals for the Fifth Circuit

DECLARATION OF PETER B. SANDMANN
IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

PETER B. SANDMANN declares as follows:

1. I am a member of the Bar of this Court. I am an attorney for respondents in this case. I make this declaration in support of respondents' Motion for Leave to Proceed In Forma Pauperis.

2. I have served as attorney for respondents in this case from the original trial in the district court to the present time. The case was brought as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, and was certified as such by the district court's order of July 19, 1971. The class is composed of all minor children incarcerated in institutions operated by the Texas Youth Council.

3. The action was originally initiated on behalf of 12 minors; in the Second Amended Complaint, on which the action was tried, 23 minors were named as plaintiffs. All of them were indigent; they were permitted, by orders of the district court and the court of appeals, to proceed in forma pauperis in the courts below.

4. This action has been before this Court on a previous petition for certiorari. At that time, respondents here were the petitioners seeking reversal of a prior decision of the court of appeals. They were granted leave to proceed in forma pauperis by order of this Court. Morales v. Turman, No. 76-5881 (Order of March 21, 1977).

5. Because of their poverty and their status as incarcerated juveniles, respondents are unable to pay the costs or fees in this case and are unable to give security therefor. As their attorney, I believe in good faith that respondents are entitled to the redress sought in this case. The nature of the case is fully set forth in the Brief in Opposition to Petition for Certiorari.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 23, 1981, at San Francisco, California.

Peter B. Sandmann